

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JAMES PETER VIZZINI</b>	:	SMALL CLAIMS DETERMINATION DTA NO. 820374
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and	:	
29 of the Tax Law for the Year 2003.	:	

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Petitioner, James Peter Vizzini, 48 Barnmead Road, Beckenham, Kent BR3 1JE, UK, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the year 2003.

A small claims hearing was held before Dennis M. Galliher, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on April 21, 2005 at 10:30 A.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael J. Miller).

***ISSUE***

Whether the Division of Taxation properly denied petitioner's claim for refund of sales tax paid upon his purchase of a motor vehicle which was immediately shipped out of the United States.

***FINDINGS OF FACT***

1. Petitioner, James Peter Vizzini, was born and raised in Buffalo, New York. After completing his education and working in the United States for a number of years, he moved to

the United Kingdom and has lived there continuously since 1994. In 1998, petitioner was granted permanent resident status in the United Kingdom, as confirmed by an August 16, 1998 letter from the United Kingdom Immigration and Nationality Directorate. During the year in question, petitioner and his wife, together with his three children who were each born in London, England, resided at 48 Barnmead Road, Beckinham, Kent, BR3 1JE, United Kingdom.

2. On December 10, 2003, during a visit to his parents' home in Buffalo, New York, petitioner purchased a 2004 Hummer H2 automobile from Towne Buick, Inc., of Williamsville, New York. The vehicle invoice reflects petitioner as the purchaser, and lists his address as 40 Putnam Street, Buffalo, New York. This invoice lists the purchase price for the vehicle, as well as fees for tire management, inspection, license, title, and the like, and also reflects sales tax in the amount of \$6,163.16. The invoice notes, at its base, "Registered to: Thomas Vizzini." Thomas Vizzini is petitioner's father, and he resides at 40 Putnam Street, Buffalo, New York.

3. In conjunction with petitioner's purchase, the dealer arranged to have the vehicle immediately loaded on a truck when it arrived at the dealer's premises and transported to Queens, New York to be placed in a container for shipment to petitioner in London, England. Petitioner, however, was advised by the dealer that the vehicle would not be "released" unless it was registered in New York State. Petitioner's request for dealer plates for transport purposes was denied by the dealer. In turn, the dealer advised petitioner that the vehicle could be registered by petitioner's father, Thomas Vizzini, and would then be released for shipment. Accordingly, the vehicle was registered and insured in the name of Thomas Vizzini, and license plates were issued.

4. Upon its arrival at the dealership premises, the vehicle was immediately loaded on a flatbed truck, transported to a transoceanic shipper in Queens, New York, loaded into a cargo

container, and ultimately delivered to petitioner in London, England. The keys and purchase paperwork for the vehicle, including the Certificate of Title, were given to petitioner's father Thomas Vizzini, who immediately mailed the same to petitioner in London. Upon arrival of the vehicle in London, petitioner paid the relevant import duty and United Kingdom tax due on the vehicle, and registered and insured the vehicle there. He removed the New York license plates and returned the same, together with the New York vehicle registration, to his father in Buffalo for surrender to the New York State Department of Motor Vehicles. There is no dispute that from the time of purchase, there was no intent by petitioner (or by his father) to use the vehicle in New York State (or in the United States), nor was the vehicle in fact ever used in or driven on the roads of New York State.

5. The Retail Certificate of Sale for the vehicle lists the prior owner as Hummer Division, Detroit, Michigan, confirms Towne Buick, Inc., DBA Hummer of Buffalo as the dealer, and lists James P. Vizzini, 40 Putnam Street, Buffalo, New York as the purchaser. This document confirms the vehicle odometer reading at four miles.

6. The New York State Certificate of Title for the vehicle, issued December 23, 2003, lists James P. Vizzini, 40 Putnam Street, Buffalo, New York, as the owner of the vehicle and again confirms the odometer reading and the actual mileage on the vehicle at four miles.

7. On April 2, 2004, petitioner submitted to the Division of Taxation ("Division") a claim for refund of the \$6,163.16 in sales tax paid on the purchase of the vehicle. By a letter dated July 2, 2004, the Division denied petitioner's claim for refund, asserting that the vehicle "was purchased by a New York resident. The registrant of the vehicle is also a New York State resident. Tangible personal property purchased by a New York resident in New York is a taxable transaction." At the hearing, the Division's representative explained that the Division

did not concede that petitioner was a nonresident of New York State who did not maintain a permanent place of abode in New York State. He further explained that, even if petitioner was a nonresident, the dealer properly collected sales tax and the transaction did not qualify for exemption pursuant to Tax Law § 1117 because petitioner did not furnish to the dealer a completed nonresident affidavit (Division Form DTF-820) at the time of sale and because the vehicle was in fact registered in New York.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1105(a) imposes tax, at the rate specified therein, on the receipts from every retail sale of tangible personal property in this State, except as otherwise provided under Article 28 of the Tax Law. As the Division points out in its answer to the petition, all sales of tangible personal property in New York State, including sales of motor vehicles, are presumed to be subject to such tax (Tax Law § 1132[c]), and the burden of proving otherwise rests with the petitioner.

B. Tax Law § 1117 provides, in relevant part, as follows:

(a) Receipts from any sale of a motor vehicle or vessel shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five of this article, despite the taking of physical possession by the purchaser within this state, provided that:

(1) the purchaser, at the time of taking delivery,

(i) is a nonresident of this state,

(ii) has no permanent place of abode in this state, and

(iii) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle or vessel will be used in this state;

(2) (i) the vendor of such motor vehicle does not issue to such purchaser with respect to such motor vehicle either a temporary certificate of

registration pursuant to subdivision seven of section four hundred twenty of the vehicle and traffic law or a temporary registration pursuant to section four hundred twenty-a of the vehicle and traffic law, or other like certificate or registration;

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(3) the purchaser does not register such motor vehicle or vessel, as the case may be, in this state prior to registering such motor vehicle or vessel in another state or jurisdiction; and

(4) prior to taking delivery such purchaser furnishes to such vendor any affidavit, statement or additional evidence, documentary or otherwise, which the commissioner may require to ensure proper administration of the tax imposed under subdivision (a) of section eleven hundred five of this article.

Tax Law § 1117(b) goes on to provide that a vendor shall not be held liable for its failure to collect sales tax on receipts from the sale of a motor vehicle, provided the vendor obtains and keeps available the affidavit, statement or additional evidence specified above at subsection (4), and has no knowledge prior to making delivery of the vehicle that such information is false.

C. In this case, the dealer of the vehicle did not advise petitioner of, nor did petitioner provide to the dealer, an affidavit of nonresident status. Rather, the dealer, who was made fully aware of the fact that the vehicle was being purchased by a nonresident and was to be immediately loaded on a truck for transport to a shipper for export out of the United States, nonetheless refused to allow “release” of the motor vehicle in question for shipment unless the vehicle was registered in New York State. The dealer suggested that the vehicle could be registered in the name of petitioner’s father, and that the dealer would then “release” the vehicle for shipment as described. As a result, the vehicle was registered to petitioner’s father using petitioner’s father’s 40 Putnam Street, Buffalo, New York address. The vehicle was “released”

and was not driven or used in New York State, but instead was directly transported by flatbed truck and ship to petitioner in London, England.

D. The Division has continued its question as to petitioner's status as a New York resident. However, the evidence submitted by petitioner clearly establishes that he was not a resident of New York State during the year in question. In fact, petitioner has not lived in the United States but rather has continuously resided in the United Kingdom since at least 1994, and his status as a permanent resident there was officially recognized by the Immigration and Nationality Directorate of the United Kingdom in 1998, some five years prior to the year at issue herein. The evidence further establishes that the 40 Putnam Street, Buffalo, New York address appearing on the documents in this case is petitioner's parents' home address, and there is no evidence in the record to indicate that petitioner owns or maintains this or any other permanent place of abode in New York State. Finally, there is no evidence or argument that petitioner is engaged in any employment, trade, business or profession in New York State. Accordingly, petitioner meets these bases for exemption on the purchase of the vehicle as set forth at Tax Law § 1117(a)(1).

E. The Tax Law goes on to provide for exemption from sales tax on the purchase of a motor vehicle notwithstanding the taking of "physical possession" of the vehicle within this state, so long as the vendor does not issue a temporary registration to the *purchaser*, the *purchaser* does not register the vehicle himself in this State, and the purchaser furnishes an affidavit (or other evidence) "prior to taking delivery" as described (Tax Law § 1117[a][1], [2], [3]). Petitioner did not furnish an affidavit or other evidence of nonresident status to the dealer (nor does it appear that the dealer required the same). Further, the vehicle was in fact registered in New York State, albeit to petitioner's father rather than to the purchaser, to wit, petitioner.

Under these circumstances, the dealer did not accord tax exempt status to the transaction, but rather collected sales tax as described. In turn, and faced with a New York registration and a New York address, the Division denied petitioner's refund claim. However, under the somewhat unusual facts of this case, the vehicle was not delivered to the purchaser, petitioner, in New York State, nor did petitioner take physical possession of the vehicle in New York State. Rather, upon registration (as required by the dealer), the dealer "released" the vehicle into the chain of shipment for export out of the United States, and delivery of the vehicle thereafter was made to petitioner, the purchaser, in London, England.

F. The sales tax imposed under Tax Law § 1105 is a "destination tax," and the point of delivery or the point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate (Tax Law § 1105[a]; 20 NYCRR 525.2[a][3]). Under the circumstances of this transaction and without the requisite proof of nonresident status of the purchaser (the affidavit option was, inexplicably, not offered petitioner by the dealer), and upon registration of the vehicle (as required by the dealer to "release" the vehicle), the dealer properly collected sales tax. However, the evidence adduced at hearing clearly establishes that the purchaser was a nonresident who did not take delivery or possession of the vehicle in New York State but rather did so in London, England.<sup>1</sup> The facts establish that the vehicle, purchased by a nonresident of this State and country, was never intended to be kept or used in any fashion in this State or country for any period of time, but rather was to be shipped from the dealer for delivery to petitioner in London. This intent was, in fact, carried out.

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<sup>1</sup> As noted, the vehicle was loaded onto a flatbed truck at the dealer's premises, as arranged by the dealer, for transport to Queens, New York and continued shipment to petitioner in England. Petitioner's father did not take possession of the vehicle in New York State, but rather simply accepted the documents, registration form and keys to the vehicle from the dealer and immediately forwarded the same to petitioner so as to enable petitioner to take delivery and possession of the vehicle upon its arrival in England.

Under such circumstances, the purchaser has established that the transaction was not subject to the sales tax (*see, Matter of David Hazan, Inc. v. Tax Appeals Tribunal*, 152 AD2d 765, 543 NYS2d 545, *affd* 75 NY2d 989, 557 NYS2d 306; *see also, Matter of Maximilian Fur Co., Inc.*, Tax Appeals Tribunal, August 19, 1990). Accordingly, petitioner is entitled to a refund of the sales tax he paid on the purchase of the vehicle.

G. The petition of James Peter Vizzini is hereby granted and the Division is directed to refund to petitioner the sales tax he paid in the amount of \$6,163.16, together with such interest as is lawfully due and owing.

DATED: Troy, New York  
July 14, 2005

/s/ Dennis M. Galliher  
PRESIDING OFFICER